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FILED
FEB 16 1971
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~No. 5398~~

ROBERT APODACA, *et al.*,

Petitioners,

v.

STATE OF OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

REPLY BRIEF FOR PETITIONERS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 5338

ROBERT APODACA, *et al.*,

Petitioners,

v.

STATE OF OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

REPLY BRIEF FOR PETITIONERS

This reply brief is filed to respond to a single point advanced by the State of Oregon. Petitioners have argued that the unanimity requirement serves to ensure full jury deliberation before a guilty verdict is returned. Petitioners' Brief at 9-12. In response to this point, the State concedes that full deliberation is one of the essential ingredients of the trial by jury guaranteed by the Constitution, but argues that this purpose can be served by requiring a two-hour minimum period of deliberation before accepting a non-unanimous jury verdict. Respondent's Brief at 24-25.

Petitioners do not agree that a minimum period of deliberation adequately safeguards the historic function of the jury as a deliberative and consensus achieving body.[1] The knowledge that a divided verdict will be accepted after two hours is likely to encourage majority jurors to wait out the minimum period, rather than to discuss and debate the evidence with minority jurors as they must if they are to achieve unanimity.

But that is not the issue before this Court. Petitioners were convicted under a procedure which permits a non-unanimous verdict without any minimum period of deliberation. And in each of their particular cases, guilty verdicts were returned less than an hour after the jury retired. In the *Cooper* case, the record shows that the jury was out of the court room for 51 minutes.[2] In *Madden*, the jury was out for less than 30 minutes.[3] In *Apodaca*, the total period was 41 minutes.[4] These periods include time spent assembling in the jury room, electing a foreman, informing the court that the jury had reached its verdict, and reassembling in court. It is plain that in these cases the juries simply did not deliberate, or at most engaged in the barest possible discussion of the issues. Verdicts were rendered

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[1] Nor, of course, would a provision that somehow did ensure full deliberation without unanimity serve the other important functions of the unanimity requirement—that of maintaining the historic standard of proof in criminal cases and of guaranteeing the integrity of the requirement that juries represent a cross-section of a community. See Brief for Petitioners, pp. 12-19.

[2] Transcript, *State v. Cooper*, at 281, 283.

[3] Affidavit of John E. Moore, Deputy District Attorney for Lane County, Oregon, reprinted as Appendix A to this Reply Brief. This affidavit and the affidavit cited in Footnote 4, both executed by trial counsel in the respective cases, have been lodged with the Clerk of this Court.

[4] Affidavit of David F. Bates, Esq., reprinted as Appendix B to this Reply Brief. See Footnote 3, *supra*.

over dissents, without the most rudimentary consideration of the views of the dissenting jurors.

If and when some American jurisdiction provides for a minimum period of deliberation *and* non-unanimous jury verdicts, it will be time enough for the Court to determine whether that procedure comports with the Sixth Amendment. But the convictions in the instant cases cannot be defended on the ground that under some other hypothetical procedure the convictions would not violate constitutional guarantees.

Respectfully submitted,

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Dated: February 1971

APPENDIX A

IN THE

CIRCUIT COURT OF THE STATE OF OREGON

FOR LANE COUNTY

THE STATE OF OREGON,
Plaintiff,

v.

JAMES ARNOLD MADDEN,
Defendant

Case No. 91211

AFFIDAVIT

STATE OF OREGON)
) ss.
County of Lane)

I, John E. Moore, having been duly sworn on oath hereby depose and say as follows:

That I am a member of the Oregon State Bar having been admitted to practice law in the State of Oregon on the 18th day of September, 1961.

That I am presently employed as a deputy district attorney for Lane County, Oregon, and that my job title is that of Chief Criminal Deputy within the Lane County District Attorney's Office.

That on December 10, 1968, I prosecuted James Arnold Madden in Lane County Circuit Court, Case Number 91211 on a charge of Grand Larceny.

That trial of the above matter consumed one day and that to the best of my recollection the jury empaneled to hear this case deliberated for a period of less than thirty (30) minutes in reaching its verdict.

/s/ John E. Moore
John E. Moore

Subscribed and sworn to before me this 3rd day of February, 1971.

/s/ Janet L. Bloom
Notary Public for Oregon
My Commission Expires: 5-22-71

APPENDIX B

IN THE

CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

No. 66044

THE STATE OF OREGON,
Plaintiff,

v.

ROBERT APODACA,
Defendant.

AFFIDAVIT

STATE OF OREGON)
) ss.
County of Marion)

I, David F. Bates, being first duly sworn, depose and say, that I am an Attorney, practicing in the County of Marion, State of Oregon, that I was the attorney who represented the above named defendant before the Circuit Court of Marion County. The defendant was charged with the crime of ASSAULT WITH A DANGEROUS WEAPON.

That I entered certain time notations in my trial notes, that I have indicated the end of the giving of instructions to the jury at 3:54 on the 10th day of October, 1968, that I further indicated the jury is back with a verdict of "guilty" by 11 to 1 county, at 4:35 o'clock. This would indicate an interval not greater than forty-one minutes.

This Affidavit is made at the request of the office of Public Defender in and for the State of Oregon for the pur-

pose of showing the time the jury was out on its deliberation.

/s/ David F. Bates
Attorney for Defendant

Subscribed and sworn to before me this 4th day of February, 1971.

/s/ Edith M. Bates
Notary Public for Oregon
My commission expires: 8-17-71